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IN THE

Supreme Court of the United States

October Term, 1972

No. 73-.....

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROBERT NEWMAN, M.D.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND SUGGESTION OF EXPEDITED CONSIDERATION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	12

INDEX TO APPENDICES

A—Opinion of the Court of Appeals Entered May 31, 1973	1a
B—Opinion and Order of the Appellate Division Entered October 31, 1972	16a
C—Opinion and Order of the Supreme Court Entered July 14, 1972	19a
D—Statutes and Regulations Involved	22a

TABLE OF AUTHORITIES

Statutes:

PAGE

Title 21, United States Code:
Section 872(c) 2, 6–7, 8
Section 1102 9
Section 1103(b) 4, 8
Section 1175(b)(2)(C) 2, 4–5, 7, 8, 9, 10

Title 42, United States Code, Section 242(a) 2, 3–4, 5, 7, 8

New York Judiciary Law, Section 750 4

Regulations:

Department of Health, Education and Welfare Regulations on Confidentiality of Methadone Patient Records, 37 C.F.R. 26800, Section 130.40 (g) 2

Special Action Office for Drug Abuse Prevention's Interpretive Regulation on Confidentiality of Drug Abuse Patient Records, 37 C.F.R. 24638-9, Section 401.62 ..... 2, 9

Other Authorities:

117 Cong. Rec. 20201 (daily ed. Dec. 2, 1971) (Remarks of Senator Ribicoff) 9

117 Cong. Rec. 20206 (daily ed. Dec. 2, 1971) (Remarks of Senator Hruska) 10

117 Cong. Rec. 20207 (daily ed. Dec. 2, 1971) (Remarks of Senator Hruska) (Remarks of Senator Dominick) 9

117 Cong. Rec. 20246 (daily ed. Dec. 2, 1971) (Remarks of Senator Chiles) 9

118 Cong. Rec. 680 (daily ed. Feb. 3, 1972) (Remarks of Representative Staggers) 9

37 C.F.R. 24636 9

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND SUGGESTION OF EXPEDITED CONSIDERATION

The District Attorney of New York County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-15a) is not yet reported. The opinion of the Appellate Division, First Department, of the Supreme Court

of the State of New York (App. B, *infra*, pp. 16a-18a) is reported at 41 A.D.2d 807. The opinion of the Supreme Court, New York County (App. C, *infra*, pp. 19a-21a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented

Whether federal statutes permit court-ordered disclosure of photographs of certain patients in a methadone clinic to an eyewitness to a homicide who recognized the killer as a fellow patient in the clinic, where the disclosure is solely to permit the apprehension of the killer whose identity cannot be learned by other means.

Statutes and Regulations Involved

This case involves 21 U.S.C. 872(c), 42 U.S.C. 242(a), 21 U.S.C. 1175(b)(2)(C), Section 130.40(g) of the Department of Health, Education and Welfare Regulations on Confidentiality of Methadone Patient Records (37 C.F.R. 26800) and Section 401.62 of the Special Action Office for Drug Abuse Prevention's Interpretive Regulation on Confidentiality of Drug Abuse Patient Records (37 C.F.R. 24638-9).

Statement of the Case

By a bare majority the New York Court of Appeals has ruled that, despite a 1972 Federal statute which expressly provides for judicially supervised disclosure of identity records of patients in methadone research and treatment clinics, two 1970 Federal statutory provisions provide an absolute bar to such disclosure. As a result of this decision, an investigation into the identity of a killer has been blocked, and a suspected murderer remains at large.

On June 7, 1972 Talmadge Berry was murdered in New York County in the presence of a witness who believed she recognized the killer as a fellow methadone patient in a clinic of the New York City Methadone Maintenance Treatment Program. When police efforts to identify Berry's assailant failed, the District Attorney of New York County issued a subpoena *duces tecum* to Dr. Robert Newman, Director of the Program, to produce photographs of certain patients fitting the killer's description, from the files of that clinic for the witness-patient to view. Dr. Newman moved to quash the subpoena, relying, in part, upon an immunity grant conferred upon him in a then proposed regulation issued by the Secretary of Health, Education and Welfare pursuant to 42 U.S.C. 242(a), which states in relevant part:

> "The Secretary [of Health, Education and Welfare] may authorize persons engaged in research on the use and effect of drugs to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identify-

> ing characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceedings to identify such individuals."

His claim of immunity was rejected on the ground that the regulation was not yet effective and, upon his refusal to obey the court's order to comply with the subpoena, Dr. Newman was held in contempt and sentenced to thirty days in jail (App. C, *infra,* pp. 19a-21a; see N.Y. Judiciary Law §750).* Shortly thereafter, the regulation relied upon by Dr. Newman for immunity was made effective (App. D, *infra,* pp. 24a-25a).

On appeal to the Appellate Division Dr. Newman asserted that the court-ordered compliance with the subpoena was void in view of 42 U.S.C. 242(a) and the Secretary's regulation. Petitioner relied upon the procedure provided for disclosing drug patients' records in the newly-enacted 21 U.S.C. 1175 (b)(2)(C), which states in pertinent part:

> *"Confidentiality of Patient Records-Disclosure Authorization.*
>
> "(a) Records of the identity * * * of any patient which are maintained in connection with the performance of any drug prevention function** authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circum-

* Dr. Newman was granted a stay in execution of the sentence and was never incarcerated pursuant to his conviction for contempt.

** "Drug prevention function" is defined in Section 1103(b), which states, "The term 'drug prevention function' means any program or activity relating to drug abuse, education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions, or is unrelated to drugs."

stances expressly authorized under subsection (b) of this section.

"Purpose and circumstances of disclosure affecting consenting or non-consenting patient

"(b) (1) [consenting patients] * * *

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows * * * (C) * * * If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

"Prohibition against use of record in making criminal charges or investigation of patient

"(c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate charges against a patient or to conduct any investigation of a patient." 21 U.S.C. §1175.

Petitioner argued that Section 1175 repealed 42 U.S.C. 242 (a) by implication and that, since 1175(b)(2)(C) had been complied with, Dr. Newman had no immunity and was required to produce the photographs. The Appellate Divi-

sion unanimously agreed with petitioner, but modified the subpoena, in order to guard against any unnecessary disclosure, by adding to it the following requirements:

> "that the witness view the photos under supervision of defendant Commissioner or someone designated by him, and that none of the pictures may be exhibited to police or prosecutor except that one which she may identify as the person sought." (App. B, *infra,* pp. 17a-18a)

That court also offered Dr. Newman an opportunity to purge himself of contempt by complying with the amended subpoena. *Ibid.*

Several days after the Appellate Division decision, the United States Attorney General issued another, independent grant of immunity to Dr. Newman (App. A, *infra,* p. 6a, n. 5) pursuant to 21 U.S.C. 872(c), which states in relevant part:

> "*Education and research programs of the Attorney General—Authorization*
>
> "(a) The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs * * * Such programs may include—
>
> * * *
>
> "(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this title, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances:
>
> * * *

> "(c) The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained."

Dr. Newman, ignoring the opportunity to purge himself, then appealed to the Court of Appeals to challenge the validity of the modified subpoena.

In that court, respondent claimed immunity based upon the Secretary's regulation, the Attorney General's grant and a regulation issued by the Special Action Office for Drug Abuse Prevention interpreting 21 U.S.C. 872(c), 42 U.S.C. 242(a) and 21 U.S.C. 1175(b)(2)(C) in a manner supportive of Dr. Newman's claim.* Petitioner, relying upon the plain meaning of 21 U.S.C. 1175(b)(2)(C) and its explicit legislative history, contended that the Special Action Office's interpretation of Section 1175 was erroneous, that 21 U.S.C. 872(c) and 42 U.S.C. 242(a) had been repealed by implication, and that the immunity granted pursuant to those provisions was a nullity. The Court of Appeals, by a vote of four to three, reversed the order of the Appellate Division and held that Congress, in enacting 21 U.S.C. 1175(b)(2)(C), had not repealed 21 U.S.C. 872 (c) or 42 U.S.C. 242(a), that Dr. Newman had immunity under Federal law, and that he could not be held in contempt for refusing to comply with the subpoena (App. A, *infra*, pp. 1a-15a). Specifically, the court reasoned that since the 1970 statutes, which authorized absolute confidentiality,

* The Special Action Office directs planning and policy for all Federal drug abuse prevention functions (21 U.S.C. 1131).

were solely addressed to "research" programs, the subject of this case, and the 1972 statute providing for disclosure was directed to "research" programs as well as "education[al]" and other types of drug programs, Congress in 1972 did not intend to reduce the absolute confidentiality provided for in 1970. In his dissenting opinion, Judge Charles D. Breitel wrote that the "plain language of the [1972] statute and the equally plain legislative history" show that Congress, in Section 1175, took the subject matter of the 1970 acts, expanded its substance, and gave both the old and expanded subject matter an entirely new treatment. In doing so, he concluded, Congress expressly, and wisely, left the disclosure or non-disclosure of records of methadone patients to the courts (App. A, *infra,* pp. 12a-15a).

Reasons for Granting the Writ

1. The issue presented by this case, which is one of first impression, is of fundamental importance regarding the extent of confidentiality of patients' records in all methadone research and treatment programs in this country. The plain meaning and legislative history of Section 1175(b)(2)(C) of the Drug Abuse Office and Treatment Act of 1972 manifest Congress's intent that the identification records of participants in "any program or activity relating to drug abuse, education, training, treatment, rehabilitation or research" [21 U.S.C. 1103(b)] be discoverable under carefully prescribed circumstances. Yet the Secretary of Health, Education and Welfare and the United States Attorney General, acting pursuant to authority delegated to them by Congress in 21 U.S.C. 872(c) and 42 U.S.C. 242(a) two years prior to the enactment of Section 1175 (b)(2)(C), have attempted to unilaterally grant drug "re-

search" programs absolute immunity from this disclosure provision. In addition, the Special Action Office for Drug Abuse Prevention, noting that the outcome of this litigation "could seriously affect treatment programs throughout the country" (37 C.F.R. 24636), issued an interpretive regulation to all methadone research program directors advising them that their patients' names are absolutely confidential and are not subject to disclosure under Section 1175 (b)(2)(C). 37 C.F.R. 24638-9, §401.62. And while the court below, by a 4-3 vote disregarded "the plain language of the statute [1175] and the equally plain supporting legislative history" (Dissenting Opinion of Judge Charles D. Breitel, *infra* at pp. 12a-15a) and accepted the Special Action Office's interpretation, the issue presented here will be a troublesome, recurring one as each of the remaining States' highest courts, as well as the Federal courts, interpret Section 1175.

Unless this Court definitively construes Section 1175 the inconsistencies and disharmony within and among the States in the application of this provision of the Drug Abuse Office and Treatment Act of 1972, which ironically was intended by Congress to create the framework for a single, uniform approach to be followed by all drug research and treatment programs [117 Cong. Rec. 20201 (daily ed. Dec. 2, 1971) (Remarks of Senator Ribicoff); *id.* at 20207 (Remarks of Senator Hruska); *id.* at 20207 (Remarks of Senator Dominick); *id.* at 20246 (Remarks of Senator Chiles); 118 Cong. Rec. 680 (daily ed. Feb. 3, 1972) (Remarks of Representative Staggers); 21 U.S.C. 1102], will have two principal devastating consequences. First, the issue will continue to interfere with the effective administration of methadone research and treatment programs in every State, as the Special Action Office has noted:

> "* * * uncertainties as to the interpretation and application of section 408 [enacted as 1175] are creating difficulties and hardships for many such programs and their patients. On the one hand, treatment program counsellors are uncertain of the extent to which they can assure patients and prospective patients of the confidentiality of treatment records; on the other hand, efforts to promote occupational rehabilitation by working with actual or prospective employers, with the consent of the patients, are being frustrated in some instances by interpretations which have been placed on section 408 [1175]." 37 C.F.R. 24636.

Secondly, the issue will seriously undermine the ability of law enforcement officials throughout the United States to identify and prosecute criminals who are enrolled in methadone research and treatment programs. The judicially supervised disclosure provided by Section 1175 was designed by Congress to strike a balance between the need for drug programs to preserve the confidentiality of their patients' records in order to induce street addicts to enroll (37 C.F.R. 24636) and the equally compelling need to avoid an "unnecessary restriction on possible prosecutions" (117 Cong. Rec. 20206 (daily ed. Dec. 2, 1971) (Remarks of Senator Hruska); App. A, *infra,* pp. 14a-15a). But the administrative interpretations of Section 1175(b)(2)(C) promulgated by the Special Action Office, the Secretary of Health, Education and Welfare and the United States Attorney General, which are largely responsible for the majority view in the Court of Appeals (App. A, *infra,* pp. 6a-11a), may destroy that balance because they purport to vest the sole power to disclose confidential records in the staff of each methadone research and treatment program. As a result of the fundamental antagonism between this administrative interpretation and that dictated by Section 1175 and its legislative history, the courts of the various

States will be free to render their own inconsistent interpretations by which some prosecutors will be permitted access to patient records while others, such as petitioner, will be denied those records and be forced to helplessly acquiesce as a murder suspect goes free. Moreover, as Judge Breitel observed in his dissenting opinion below, the clear will of Congress has been frustrated by administrators in the executive branch of the Federal Government. Under these circumstances, and in view of the concern manifested by the Federal Government in its *amicus* brief submitted in the court below, review of such an important decision by this Court is appropriate.

2. As a result of the erroneous decision of the court below, a murderer is currently at large. Since the eyewitness to the homicide is available and waiting to participate in an identification proceeding, and since reliability of any such identification will diminish with the passage of time, petitioner believes it is in the interest of the People of the State of New York as well as that of public justice for this Court to expedite its consideration of this petition and render a determination prior to the end of the 1972 Term. Furthermore, if certiorari is granted, petitioner respectfully requests that this Court establish a briefing schedule that will permit the case to be heard at the October argument session.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1973

APPENDICES

Appendix A

Opinion of the Court of Appeals Entered May 31, 1973

STATE OF NEW YORK

COURT OF APPEALS

1 No. 68 73

THE PEOPLE &c.,

Respondent,

vs.

ROBERT NEWMAN, M.D.,

Appellant.

FULD, Ch.J.:

The principal question posed by this appeal—one of first impression—is whether the Director of the New York City Methadone Maintenance Treatment Program may validly refuse—when so authorized by the Attorney General of the United States and the Secretary of Health, Education and Welfare, pursuant to Federal legislation—to comply with a grand jury subpoena directing him to produce photographs of certain of his patients.

Talmadge Berry was shot and killed in Manhattan on June 7, 1972. A witness to the shooting told the police that she believed she had previously seen the killer in the waiting room of a methadone maintenance treatment clinic (known as Unit Number Two of the Francis Delafield Hospital Methadone Maintenance Treatment Program) where

she was also a patient. Some time later, based on this information, a subpoena was served on Dr. Robert Newman —the Director of the New York Methadone Maintenance Treatment Program—requiring him to produce photographs of Negro males between the ages of 21 and 35 who were patients at Unit Two of Delafield in 1972, prior to June 7.

A motion was subsequently made to quash the subpoena on the grounds that both Federal legislation and New York law—CPLR 4504, subdivision (a)—prohibited production of the photographs. That motion was denied and Dr. Newman was thereafter adjudged to be in contempt of court and sentenced to 30 days in jail. Although the Appellate Division recognized that the refusal of the appellant, Dr. Newman, to obey that subpoena was "[a]pparently motivated by the highest ethical canons of the medical profession in respect of confidential relations with a patient," it agreed with Special Term that Dr. Newman was guilty of contempt (40 A D 2d 633, 634; 40 A D 2d 672).[1]

In our court, as below, the appellant relies on both New York law (CPLR 4504, subd. [a]) and the Federal legislation enacted in 1970 (Comprehensive Drug Abuse Prevention and Control Act of 1970 [P.L. 91-513; 84 U.S. Stat. 1236]).

---

1. The Appellate Division modified Special Term's order by adding to the subpoena "appropriate safeguards against unnecessary disclosure": the witness to the homicide was to "view the photos under supervision of [Dr. Newman] or someone designated by him" and none of the pictures other than the one identified by the witness were to be exhibited to the police or prosecutor (40 A D 2d 633, 634).

Appendix A

Under State Law

Subdivision (a) of CPLR 4504, entitled "Confidential information privileged," provides that, "Unless the patient waives the privilege, a person authorized to practice medicine * * * shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Although it is doubtless true, as the appellant's affidavit recites, that the photos are "an absolutely indispensable component of the patient records" because they ensure proper identification of the patient and thus avoid administration of methadone to the wrong person, we do not regard them—to employ the words of the statute—as having been "acquired in attending a patient in a professional capacity." Rather, they were obtained by the appellant's staff during administrative admission procedures. Their true role, therefore, is not to enable the doctor to act in his "professional capacity" but to prevent unregistered patients from obtaining methadone and registered patients from obtaining the wrong dosage through administrative errors in identification. Serving solely such a medical management function, they may not be deemed privileged confidential information within the sense of the statute. This conclusion is supported by decisions holding that facts about a patient—which may be plainly observed or easily obtained by a layman—are not privileged. (See, e.g., *Klein* v. *Prudential Ins. Co.*, 221 N.Y. 449, 453; *Edington* v. *Aetna Life Ins. Co.*, 77 N.Y. 564, 571; *In re Albert Lindley Lee Memorial Hospital*, 115 F. Supp. 643, 646, affd. 209 F. 2d 122, cert. den. *sub nom. Cincotta* v. *U.S.*, 347 U.S.

960; see, also, 5 Weinstein-Korn-Miller, New York Civ. Prac., par. 4504.08.) Consequently, the appellant may not rely on New York's physician-patient privilege to justify nonproduction of the photographs.[2]

Under Federal Law

Dr. Newman, as already indicated, also urges that the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513; 84 U.S. Stat. 1236)—hereafter referred to as the 1970 Act—and regulations issued under that Act prevent him from releasing the photographs. The District Attorney, on the other hand, contends that, pursuant to the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255; 86 U.S. Stat. 65)—hereafter referred to as the 1972 Act—the directors of methadone maintenance programs may be compelled to produce those records upon court order. Therefore, the issue posed upon this appeal is whether the 1972 Act repealed the 1970 Act insofar as the confidentiality of a patient's record is concerned.

Subdivision (a) of section 3 of the 1970 Act (U.S. Code, tit. 42, §242a, subd. [a]) and subdivision (c) of section 502 (U.S. Code, tit. 21, §872, subd. [c]) contain the controlling provisions. The first provided that the Secretary of the Department of Health, Education and Welfare was empowered to authorize persons "engaged in research on the use and effect of drugs" to "protect the privacy of the

2. In the view which we have taken on this aspect of the case, it is unnecessary to consider whether title VI of the recently enacted New York State Controlled Substances Act (Public Health Law, §3370 et seq.) would also preclude the photos from being "deemed confidential within the meaning of the civil practice law and rules" (Public Health Law, §3373).

research subjects" (i.e., the patients) by withholding their "names or other identifying characteristics" from anyone not connected with the research program. "Persons so authorized," the statute continued, "may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceedings" to identify the research subjects. The other provision—subdivision (c) of section 502—granted the same authority to the Attorney General. By March of 1972, however, neither the Secretary of HEW nor the Attorney General had exercised the authority thus given to such official.

Be that as it may, in that month, the 1972 Act—which, we note, was born of Congressional recognition that "[c]ontrol of drug abuse requires the development of a comprehensive, coordinated long-term Federal strategy" (U.S. Code, tit. 21, §1101, subd. [8])—was enacted. Instead of sanctioning a grant of absolute confidentiality, similar to that provided by the 1970 Act for drug research programs, the 1972 Act authorized disclosure upon court order of the records of patients in a wide variety of drug programs and activities, entitled "drug abuse prevention functions."[3] More specifically, subdivision (a) of section 408 (U.S. Code, tit. 21, §1175, subd. [a]) recited that "Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function * * * shall be confidential," subject, however, to disclosure upon au-

3. Section 103 [*sic*], subdivision (b), of the 1972 Act (U.S. Code tit. 21, §1103, subd. [b]) defined "drug abuse prevention function" as "any program or activity relating to drug abuse education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is * * * unrelated to drugs."

thorization by "a court of competent jurisdiction" after "application showing good cause therefor."

After *the 1972 Act* had been enacted, the Secretary of HEW and the Attorney General each exercised his power under *the 1970 Act* to authorize persons "engaged in [drug] research" to withhold "the names and other identifying characteristics" of the research subjects, that is, the patients. Thus, the Secretary of HEW published regulations which provide—with respect to the methadone maintenance treatment programs such as that conducted by the appellant—that "information that would identify the patient will be kept confidential * * * and will not be divulged in any civil, criminal, administrative, legislative, or other proceedings conducted by Federal, State, or local authorities" (37 Federal Register 6943).[4] And the Attorney General, in a letter to Dr. Newman, dated November 8, 1972, also granted absolute confidentiality to patient records in his New York Methadone Maintenance Treatment Program.[5]

A little more than a week after the Attorney General had granted absolute confidentiality to Dr. Newman's

4. The regulation—entitled "Methadone: Proposed Special Requirements for Use"—was first published in the Federal Register on April 6, 1972—prior, we note, to the issuance of the subpoena in this case—and was promulgated by the Commissioner of Food and Drugs, pursuant to the authority vested in him by the Secretary of HEW (37 Federal Register 6940). It was published in final form on December 15, 1972, and became effective on that date (37 Federal Register 26790, 26800, 26806).

5. The letter read in this way: "I hereby authorize you to withhold the names and other identifying characters of persons who are the subjects of research conducted pursuant to and in conformity with this research project. You may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of such research."

methadone program, the Special Action Office for Drug Abuse Prevention—established by the 1972 Act "to provide overall planning and policy and establish objectives and priorities for all Federal drug abuse prevention functions" (U.S. Code, tit. 21, §1131, subd. [a])—prepared, "in consultation with the Department of Justice and the Department of Health, Education and Welfare," an "interpretative regulation" to "deal comprehensively" with section 408, the confidentiality provision of the 1972 Act (37 Federal Register 24636). "If society is to make significant progress in the struggle against drug abuse," the regulation read, the directors of "drug abuse treatment programs" must be able "to assure patients and prospective patients of anonymity."[6] The regulation also recited that the 1972 Act was not designed to repeal or amend the confidentiality provision of the 1970 Act (37 Federal Register 24639):

> "Nothing in either the language or the legislative history of the [1972] Act indicates any intent on the part of Congress to amend the [confidentiality] provisions of the 1970 Act or to reduce the protection which can be afforded under them. * * * the language of section 408 permits * * * a construction which harmonizes with the 1970 Act [and] clearly should not be construed to authorize a court order in derogation of any exercise of the authority of the Secretary of Health, Education, and Welfare * * * or the Attorney General."

6. The regulation further stated that "[t]he identification of a person as a patient of a general practitioner or a hospital clinic is not ordinarily of great significance, but the identification of a person as an enrollee in a narcotic treatment program can, in and of itself, have profoundly adverse consequences" (37 Federal Register 24636).

Appendix A

The interpretation of the Special Action Office—that the 1972 confidentiality provision neither "amend[ed] the [confidentiality] provisions of the 1970 Act" nor "reduce[d] the protection afforded under them" (37 Federal Register 24639)—is reasonable and persuasive. The authority in the 1970 Act to grant absolute confidentiality was designed to help ensure the success of drug research programs in which addict participants require anonymity (see, e.g., 1970 U.S. Code Cong. and Admin. News 4594-4595). A similar guarantee of anonymity was not, however, thought to be necessary in the 1972 Act because that statute covered a wide range of programs and activities ("drug abuse prevention functions") in which absolute confidentiality was not regarded as a prerequisite to successful operation of the programs.

For example, the success of a drug abuse education program, or of a job training program for medical aides—which are "drug abuse prevention functions" within the terms of the 1972 Act—does not depend upon the participants being assured of complete anonymity. Presumably, no one would refuse to participate in such programs—in contrast with a methadone maintenance program—because his picture might be exhibited to an eyewitness to a crime. The 1972 Act, therefore, permitted the records of program participants in "drug abuse prevention functions" to be disclosed "if authorized by an appropriate order of a court of competent jurisdiction" (U.S. Code, tit. 21, §1175, subd. [b][2][C]). That statute did not, however, affect the provision in the 1970 Act for absolute confidentiality in drug research programs.

It is of high significance that the other governmental agencies which, along with the Special Action Office, actual-

ly administer, coordinate and implement the 1970 and 1972 Acts have agreed with that agency's interpretation that the 1972 Act did not repeal or modify the absolute confidentiality provision of the 1970 Act. Not only did the Secretary of HEW—as well as the Attorney General—grant Dr. Newman's program absolute confidentiality under the 1970 Act *after* the 1972 Act had been enacted (37 Federal Register 6943; 37 Federal Register 26800) but the Department of Health, Education and Welfare—along with the Special Action Office—filed a Brief Amicus Curiae for the United States of America in support of the appellant's position.

Indeed, after noting that the Methadone Maintenance Treatment Programs are "the most important drug addiction research programs presently in existence" and that their "long range success * * * depends on the ability of each program director to promise to each participant, *unconditionally,* that his participation in the program will not be disclosed," the authors of the Government's brief went on to point out that "the United States Congress has enacted legislation over the last few years to encourage research into [the] causes and cures [of narcotic addiction]. In order to induce those suffering from drug addiction * * * to participate in these research programs, Congress enacted [in 1970] a statute granting *absolute* confidentiality to such participants, upon proper authorization. * * * [T]his federal statute is in full force and effect and is fully applicable to Methadone Maintenance Treatment Programs."

The construction thus given to the legislation by the very agencies charged with its administration, supervision

and enforcement is entitled to considerable weight. (See, e.g., *Matter of Howard* v. *Wyman*, 28 N Y 2d 434, 438; *Lewis* v. *Martin*, 397 U.S. 552, 559; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381; *Zemel* v. *Rusk*, 381 U.S. 1, 11; cf. *Ferraiolo* v. *O'Dwyer*, 302 N.Y. 371, 376; *Grimmer* v. *Tenement House Department*, 204 N.Y. 370, rearg. den. 205 N.Y. 549, 550.) It is enough to recall, as we wrote in the *Howard* case (28 N Y 2d, at p. 438), that "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."

Certainly, as noted above, it may not be said that the interpretation accorded the 1972 Act by the Special Action Office as part of a "comprehensive, coordinated long-term Federal strategy" against drug abuse was either "irrational" or "unreasonable." The confidentiality provision of the 1972 Act applies to "drug abuse prevention functions" in general, while the absolute confidentiality provision of the 1970 Act applies to drug research programs, such as Dr. Newman's, where the success of the program depends upon the ability of the director to guarantee each patient that his participation will not be disclosed to anyone not connected with the program.

Our conclusion that the 1972 Act effected no repeal or modification of the 1970 provision is strengthened by the long-standing rule that, unless there is clear evidence of a legislative design to repeal or modify an earlier piece of legislation—and, assuredly, no such explicit design is here manifest—we must, if at all possible, give full effect to both statutes. (See, e.g., *People* v. *Mann*, 31 N Y 2d 253, 257-258; *Mtr. of Bd. of Educ. of City of N.Y.* v. *Allen*, 6 N Y 2d

127, 141-142; *Cimo* v. *State of New York*, 306 N.Y. 143, 148-149; *Trade Comm'n* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202; *United States* v. *Borden Co.*, 308 U.S. 188, 198-199.)[7] "[I]t is familiar learning," the court stated in the *Allen* case (*Mtr. of Bd. of Educ. of City of N.Y.* v. *Allen*, 6 N Y 2d 127, 141-142, *supra*), "that repeals by implication are not favored by the courts. Generally speaking, a statute is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for two statutes, that construction should be adopted." Quite obviously, there are no express words of repeal in the 1972 Act, and it is equally clear that the two statutes are not in such conflict that both may not be given effect. Since, therefore, Dr. Newman may not be compelled to produce the photographs, he may not be held in contempt.

The order appealed from should be reversed, the adjudication of contempt vacated, and the motion to quash the subpoena granted.

---

7. To support his contention that the 1972 Act effected a repeal of the provision authorizing absolute confidentiality to drug research programs by the 1970 Act, the respondent District Attorney points to statements of individual members of Congress made during its debate on the 1972 Act. Such reliance is misplaced. It has long been established that, since such statements tend to show the thinking of a few legislators rather than the intent of Congress as a whole, they "are not a safe guide, and may not be resorted to, in ascertaining the meaning and purpose of the law-making body." (*Duplex Co.* v. *Deering*, 254 U.S. 443, 474; see, e.g., *Zuber* v. *Allen*, 396 U.S. 168, 186; *United States* v. *Freight Association*, 166 U.S. 290, 318-319; Sutherland Statutes and Statutory Construction [3d ed.], §5011; see, also, with respect to New York Legislature, *Matter of Morse* [*Bank of America*], 247 N.Y. 290, 302-303; *Woollcott* v. *Shubert*, 217 N.Y. 212, 221.)

BREITEL, J. (dissenting):

Upon a showing that a witness to a homicide believed she had seen the killer, a fellow-patient, in the waiting room of a methadone clinic, the Appellate Division sustained a subpoena *duces tecum* to produce photographs of certain patients from the files of the clinic for the witness to view under carefully circumscribed conditions. The court order was authorized under a federal statute controlling the confidentiality of patient records which provides in part:

> "(b) (2) If the patient * * * does not give his written consent, the content of such record may be disclosed as follows:
>
> * * *
>
> (C) If authorized by an appropriate order of a court of competent jurisdiction after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.
>
> (c) Except as authorized by a court order granted under subsection (b) (2) (C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient."
>
> (U.S. Code, tit. 21, §1175)

Appendix A

The effect of the statute is to place on the court the sole power to disclose a patient's record after balancing the several interests involved. That is what it says. There are no qualifications. It does not give any primary or secondary role in the disclosure to the program officials or to supervisory administrators.

Ordinarily, one would look no further to legislative history because the meaning is patent. However, resort to the legislative history, even if some might regard such resort as unnecessary in the face of the statutory language, produces the same result.

This section is part of comprehensive federal legislation entitled The Drug Abuse Office and Treatment Act of 1972 controlling drug treatment and rehabilitation programs. If the proper interpretation of a statute is in doubt, reference may be made to changes and proposed changes of the bill during its passage to determine the legislative intent (*Woollcott* v. *Shubert*, 217 N.Y. 212, 221; McKinney's, Statutes, §125, esp. p. 258). A preliminary draft bill of this law, introduced in the Senate on June 18, 1971, contained no provision for the confidentiality of methadone patients' records (117 Cong. Rec. 20786-7). The bill was amended in committee providing that the records were to be confidential, and precluding their use by prosecutors (S. Rep. Nos. 92-486, 92-509). The House version of the bill had no confidentiality provision.

The law enacted was a compromise drafted by the House-Senate Conference Committee (Conf. Rep. No. 92-920). It included a confidentiality clause with the provision quoted above, incorporating an idea expressed by Senator

Hruska, allowing patients' records to be subpoenaed by court order (117 Cong. Rec. 20206).

The federal regulation relying on a 1970 statute would not have permitted the disclosure ordered in this instance. True, the regulation states that "Nothing in either the language or the legislative history of the [1972] Act indicates any intent on the part of Congress to amend the provisions of the 1970 Act or to reduce the protection which can be afforded under them," and this interpretation is entitled to considerable weight. But this interpretation is not controlling where Congress spelled out its intent to enact a new comprehensive scheme expressly permitting courts to order limited disclosure on good cause shown (McKinney's, Statutes, §129, subd. [b], *supra*).* The new scheme is designed to give maximum protection to "civil liberties" and to "the success of the treatment programs" without an "unnecessary restriction on possible prosecu-

* The McKinney's text states the rule as follows:

"Generally, a court should not hide behind the ruling of an administrative officer or agency and thus escape the duty to interpret the statute, since the court is the final arbiter as to the proper construction. In other words, a court should not blindly follow the rulings of administrative officers in construing statutes. Even though practical construction by an officer or agency charged with administration of a statute, especially when followed by a long period of time, is entitled to great weight and may not be ignored, such an interpretation is not necessarily binding on court.

If any act is not ambiguous, there is no room for the doctrine of practical construction, for the courts must effectuate the plainly expressed intention of the Legislature without regards to the opinion of public officers. * * *

In any event, doubtful meaning of a statute cannot be clarified or aided by practical construction of officers unless it first appears that such construction has been long established and continuous. * * *"

tions" (Senator Hruska, 117 Cong. Rec. 20206, *supra;* Representative Mikva, 118 Cong. Rec. 710).

In sum, given the plain language of the statute and the equally plain supporting legislative history, judicial control over the confidentiality of patients' records in the program is established. The recent post-enactment gloss on the legislative intention by the administrative officials is of no significance, especially when it is contradictory of the language of the statute. It was quite wise for the Legislature to leave the matter in the discretion of the courts, rather than with the director of the program, with the mandate to serve the policy of the legislation and yet protect innocents and the larger public policy of the State. Even if ambiguous language were involved, one should hesitate to ascribe a meaning to it which may very well mean in this case that a murderer should go free. I would make no such ascription because the language is quite clear, and I would not unless the language, the legislative history, or long continuous administrative construction compelled it.

Accordingly, the order of the Appellate Division should be affirmed.

• • •

Order reversed, without costs, the adjudication of contempt vacated and the motion to quash the subpoena granted. Opinion by Fuld, Ch. J. All concur except Breitel, J., who dissents and votes to affirm in an opinion in which Jasen and Gabrielli, JJ., concur.

Appendix B

Opinion and Order of the Appellate Division Entered October 31, 1972

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 31st day of October, 1972.

Present:

Hon. Harold A. Stevens, Justice Presiding
Owen McGivern
Arthur Markewich
Emilio Nunez
James B. M. McNally, Justices

m 10433

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

ROBERT NEWMAN, M. D.,
Appellant.

Order, Supreme Court, New York County, entered July 14, 1972, unanimously modified, on the law, to add to the subpoena duces tecum, subject of the motion to quash, the conditions hereinafter set forth, without costs: mandate, Supreme Court, New York County, entered July 25, 1972, unanimously modified, on the law and in the exercise of discretion, to provide that, within thirty days from entry

of the order to be settled hereon, defendant-appellant may be purged of the adjudication of contempt by complying with the said subpoena as so modified, without costs. Apparently motivated by the highest ethical canons of the medical profession in respect of confidential relations with a patient, defendant-appellant Assistant Commissioner of Health Services, responsible for direction of our city's methadone treatment program, has refused to obey a subpoena, as ordered by the court, which called upon him to produce certain photographs of patients so that a witness to a homicide might view them. The witness, said to be a patient in the drug program, has told investigating authorities that she believes the perpetrator of the crime to have been a fellow patient, and it is desired that she have the opportunity to endeavor to select his picture from amongst those of the patients. The program has Federal financing, and the applicable Federal statue controls. Absent consent by the unknown patient-suspect, "the content of * * * [his] * * * record may be disclosed * * * If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services." (U. S. Code, tit. 21, §1175, subd. [b], par. [2], cl. [C]). Special Term has weighed these factors and, implicit in the order here reviewed, has determined that the public interest in apprehending a killer outweighs possible injury to a patient by his mere identification as such as well as any possible injury to the physician-patient relationship and to the treatment services. In ruling upon

the question, however, Special Term did not "impose appropriate safeguards against unnecessary disclosure" as required by the same section and subdivision of the United States Code. Appropriate safeguards have been consented to by the People, both in the papers under review and on argument, and we now impose them: that the witness view the photos under supervision of defendant Commissioner or someone designated by him, and that none of the pictures may be exhibited to police or prosecutor except that one which she may identify as the person sought; to that extent we modify the order appealed from. Since the safeguards were not in effect when appellant refused to obey the subpoena, we do now grant him the opportunity to be purged of contempt, as above set forth. With these safeguards, the Commissioner may now comply with the court's direction without fear of any breach of ethics. In concluding, we add that we find recourse to CPLR 4504 (subd. [a]) misplaced. Privilege against revelation of doctor-patient communication can be revoked only after the existence of the relationship has been determined. The only revelation sought is precisely that: identification of the patient as such.

Appendix C

Opinion and Order of the Supreme Court
Entered July 14, 1972

SUPREME COURT

NEW YORK COUNTY

TRIAL TERM—PART 30

In the matter of a
Subpoena Duces Tecum issued to SIDNEY BERTRAND for a grand jury investigation into the death of
TALMADGE BERRY.

The petitioner, Sidney Bertrand, moves for an order to quash the subpoena duces tecum issued to him by a grand jury of the County of New York.

The subpoena was issued to Dr. Bertrand as administrative director of Unit Number Two of the Francis Delafield Hospital Methadone Maintenance Treatment Program. This subpoena instructed him to bring with him photographs of all male Negro patients between the ages of 21 and 35 years who are in the Methadone Maintenance Treatment Program and to appear with such photographs before a grand jury of this county. In an affidavit to this Court, Sidney Bertrand stated that he did not have the power to comply with the subpoena and that he was not the proper party to be served with said subpoena.

Appendix C

In another affidavit submitted to this Court, Dr. Robert Newman stated that he, as the director of the New York City Methadone Maintenance Treatment Program, has the responsibility for determining what records can and cannot be shown under this program. Dr. Newman has been served by the district attorney's office with a similar subpoena and has been joined in this action.

The moving papers allege two arguments in support of the petitioner's demand to quash the subpoena.

The first argument is that the federal law controls the confidentiality of methadone records and prohibits disclosure of any patient-identifying information. To substantiate this argument, the petitioner points to the Public Health Service Act as amended by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 42 U.S. Code §242a. This section authorizes the Secretary of Health, Education and Welfare to permit persons engaged in research on the use and effect of drugs to protect the privacy of individuals who are subjects of such research. The section further states that the person so authorized to protect the privacy of such individuals may not be compelled to identify any such individuals in any federal, state, or local civil, criminal, administrative, legislative, or other such proceedings. On April 6, 1972, the Commissioner of the Food and Drug Administration of the Department of Health, Education and Welfare published proposed regulations for all methadone maintenance programs that, in effect, provided for the protection as above set forth. The local methadone program is partially federally funded and might fall under this federal law.

Appendix C

The petitioner alleges only that the regulations as stated above have been proposed, but there is no showing that this, in fact, is the federal law. Therefore, this Court need not determine whether this law is applicable to the cause at bar.

The petitioner also asserts that section 4504, subdivision (a) of the Civil Practice Law and Rules makes the photographs requested privileged communication. The petitioner is mistaken. The privilege extends only to the information which would enable the physician to prescribe or act as a physician or surgeon. The photographs in question do not enable the petitioner to act in the capacity of a physician or a surgeon.

Therefore, the motion to quash the subpoena is denied. This constitutes the decision and order on the motion. The clerk of the court is directed to forward a copy of this decision and order, with notice of entry, to the attorney for the defendant.

Appendix D

Statutes and Regulations Involved

21 U.S.C. 872(c) provides in pertinent part:

Education and research programs of the Attorney General—Authorization

(a) The Attorney General is authorized to carry out educational and research programs directly related to enforcement of the laws under his jurisdiction concerning drugs * * * Such programs may include—

* * *

(3) studies or special projects designed to assess and detect accurately the presence in the human body of drugs or other substances which are or may be subject to control under this title, including the development of rapid field identification methods which would enable agents to detect microquantities of such drugs or other substances:

* * *

(c) The Attorney General may authorize persons engaged in research to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

42 U.S.C. 242(a) provides in pertinent part:

The Secretary [of Health, Education and Welfare] may authorize persons engaged in research on the use

and effect of drugs to protect the privacy of individuals who are the subject of such research by withholding from all persons not connected with the conduct of such research the names or other identifying characteristics of such individuals. Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceedings to identify such individuals.

21 U.S.C. 1175(b)(2)(C) provides in pertinent part:

Confidentiality of Patient Records-Disclosure Authorization.

(a) Records of the identity * * * of any patient which are maintained in connection with the performance of any drug prevention function* authorized or assisted under any provision of this Act or any Act amended by this Act shall be confidential and may be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Purpose and circumstances of disclosure affecting consenting or non-consenting patient

(b) (1) [consenting patients] * * *

(2) If the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, does not give his written consent, the content of such record may be disclosed as follows * * *

---

*"Drug prevention function" is defined in Section 1103(b), which states, "The term 'drug prevention function' means any program or activity relating to drug abuse, education, training, treatment, rehabilitation, or research, and includes any such function even when performed by an organization whose primary mission is in the field of drug traffic prevention functions, or is unrelated to drugs."

> (C) * * * If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefore. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Prohibition against use of record in making criminal charges or investigation of patient

> (c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate charges against a patient or to conduct any investigation of a patient." 21 U.S.C. §1175.

Section 130.40(g) of the Department of Health, Education and Welfare Regulations on Confidentiality of Methadone Patient Records (37 C.F.R. 26800) provides in pertinent part:

> * * * in accordance with the authority conferred by * * * 42 U.S.C. 242(a) every program is hereby further authorized to protect the privacy of patients therein by withholding from all persons not employed by such program or otherwise connected with the conduct of its operations the names or other identifying characteristics of such patients under any circum-

stances under which such program has reasonable grounds to believe that such information may be used to conduct any criminal investigation or prosecution of a patient. Programs may not be compelled in any Federal, State, or local civil, criminal, administrative, or other proceedings to furnish such information, but this subparagraph does not authorize the withholding of information authorized to be furnished pursuant to §401.44 of this title nor does it invalidate any legal process to compel the furnishing of information in accordance with §401.44 of this title. Records relating to the receipt, storage, and distribution of narcotic medication shall also be subject to inspection as provided by Federal controlled substances laws; but use or disclosure of records identifying patients will, in any case, be limited to actions involving the program or its personnel.

Section 401.62 of the Special Action Office for Drug Abuse Prevention Interpretive Regulation on Confidentiality of Drug Abuse Patient Records (37 C.F.R. 24638-9), provides in relevant part:

(a) It is abundantly clear that Section 408 [enacted as section 1175] (b)(2)(C) was not intended to confer jurisdiction on any court to compel disclosure of any information, but solely to authorize such disclosure. An order or provision of an order based on some other authority, or a subpoena, or other appropriate legal process, is required to compel disclosure. To illustrate, if a person who maintains records subject to section 408 [1175] (a) of the Act is merely requested, or is even served with a subpena, to disclose information contained therein which is a type whose disclosure is not authorized under section 408 [1175] of the Act or

any of the foregoing provisions of this part, he must refuse such a request unless, and until, an order is issued under section 408 [1175] (b)(2)(C). Such an order could authorize, but could not, of its own force, require disclosure. If there were no subpena or other compulsory process, the custodian of the records would have the discretion as to whether to disclose the information sought unless and until disclosure were ordered by means of appropriate legal process, the authority for which would have to be found in some source other than section 408 [1175] of the Act. This result is compelled by the language of section 408 [1175] (b)(2) itself. The words used, "the content of such record may be disclosed * * * if authorized by an appropriate order" are too explicit and too well established as words of art to be interpreted as meaning "the content of such record shall be disclosed if required by an appropriate order."

(b)(1) This interpretation of the permissible scope of a 408 [1175] (b)(2)(C) order is not only appropriate in the light of the purposes, language and legislative history of the Act in which it appears, but also is necessary in order to harmonize that section with other legislation dealing with a narrower aspect of the same subject matter. By sections 3(a) and 502(c) of the Comprehensive Drug Abuse Control and Treatment Act of 1970 (42 U.S.C. 242a(a); 21 U.S.C. 872 (c)), Congress conferred on the Secretary of Health, Education, and Welfare and on the Attorney General, respectively, power to authorize persons engaged in drug research to withhold names and other identifying characteristics of persons who are the subject of such research, and expressly provided that when such authority has been obtained, its holder may not be compelled to disclose identifying information "in any Fed-

eral, State, or local civil, criminal, administrative, legislative, or other proceedings * * *"

(2) If section 408 [1175] of the 1972 Act were to be interpreted as an independent grant of authority to compel testimony, it would obviously be in direct conflict with the provisions of the 1970 Act discussed above. This becomes significant, for example, in the case of methadone, which for the purpose of treating opiate addiction on a longer-range basis is classified as an experimental drug which may not be administered except in connection with research. Nothing in either the language or the legislative history of the Act indicates any intent on the part of Congress to amend the provisions of the 1970 Act or to reduce the protection which can be afforded under them. Since the language of section 408 [1175] permits, if it does not require, a construction which harmonizes with the 1970 Act, it clearly should not be construed to authorize a court order in derogation of any exercise of the authority of the Secretary of Health, Education, and Welfare under section 242a(3) of title 42, United States Code, or the Attorney General under section 872(c) of title 21, United States Code.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1694.

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROBERT NEWMAN, M.D.,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

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Table of Contents.

	Page
Introductory	1
Counterstatement of the Questions Presented	1
Statement of the Case	2
Preliminary	2
The background of this litigation	4
The paramount public interest	5
POINT I. Since the term of the Third July 1972 Grand Jury which issued the subject subpoena has expired and that Grand Jury has been discharged, this proceeding to enforce compliance with the subpoena issued by that Grand Jury became moot upon the New York Court of Appeals' vacatur of the adjudication of contempt	8
POINT II. The court below correctly held that the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255) effected no repeal or modification of the authority conferred by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513) upon the Attorney General and the Secretary of Health, Education and Welfare to provide for absolute confidentiality in the case of patients in methadone maintenance programs	10
The need for absolute confidentiality in the case of methadone programs	10

Page

The Legislative History of P.L. 92-255 referred to by petitioner (pp. 9-10) is misleading and based on isolated comments taken out of context 14

The Conference Report 15

The "coordinated long-term Federal strategy to combat drug abuse" 16

Conclusion. The petition for a writ of certiorari should be denied 18

Appendix:

Excerpt From the Transcript of Dr. Newman's Appearance Before 3rd Grand Jury for New York County on July 25, 1972 19

TABLE OF CASES.

Blackburn v. Alabama, 361 U. S. 199 6

Escobedo v. Illinois, 378 U. S. 478 6

Golden v. Zwickler, 394 U. S. 103, 108 9

Jackson v. Denno, 378 U. S. 368 6

Pennington v. Coxe, 6 U. S. (2 Cranch) 33, 59 13

Roe v. Wade, U. S. , 35 L. Ed. 2d 147, 161 10

Page

SEC v. Medical Committee for Human Rights, 404 U. S. 403, 406 9

United States v. 24 Cans Containing Butter, 148 F. 2d 365, 367 13

Zuber v. Allen, 396 U. S. 168, 186 14

AUTHORITIES.

Legislative History, U.S.C.C. & A.N., April 30, 1972, page 915 2

P.L. 92-255 2

21 U.S.C. §1175 2

P.L. 91-513 2

21 U.S.C. §872(c) 2

42 U.S.C. §242(a) 2

21 U.S.C. §1101 7

House Report No. 92-920, 92d Cong., 2d Sess., 1972 U.S.C.C. & A.N. 930-940 15

Special Action Office for Drug Abuse Prevention Regulations, 21 C.F.R. 401, 37 Fed. Reg. 24636-24639 ..... 3, 4, 9

F.D.A. Regulations, 21 C.F.R. §§ 130.44, 130.48, 37 Fed. Reg. 26790-26807; 21 C.F.R. 130, 37 Fed. Reg. 6940 ..... 3, 9

Congressional Record, 117 Cong. Rec. S20189-S20251, H676-H715 14

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1694

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ROBERT NEWMAN, M.D.,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

Introductory.

Petitioner seeks to have this Court review a judgment of the New York Court of Appeals (N. Y. 2d , May 31, 1973) holding that Robert Newman, M.D., as Director of the New York City Methadone Maintenance Treatment Program, could validly refuse to comply with a grand jury subpoena directing him to produce confidential photographs of certain of his patients, where such refusal was authorized by the Attorney General of the United States and the Secretary of Health, Education and Welfare, pursuant to Federal legislation.

Counterstatement of the Questions Presented.

1. Whether these proceedings to compel compliance with a subpoena issued by the Third July 1972 Grand

Jury are not moot since that grand jury's term has expired and it has been discharged?

We submit that this question should be answered in the affirmative.

2. Whether the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255; 21 U. S. C. §1175) effected an implied repeal of the authority conferred by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513; 21 U. S. C. §872[c] and 42 U. S. C. §242[a]) upon the Attorney General and the Secretary of Health, Education and Welfare to provide for absolute confidentiality in the case of patients in methadone maintenance programs?

The New York Court of Appeals held that it did not.

3. Whether the decision of the court below, which agreed with and upheld the interpretation and construction of the legislation as authorizing absolute confidentiality given to it by the Special Action Office for Drug Abuse Prevention, the Attorney General, the Secretary of Health, Education and Welfare, the Food and Drug Administration and the Bureau of Narcotics and Dangerous Drugs, the agencies charged with its administration, supervision and enforcement, is not correct?

We submit that it is, that the decision follows well established canons of statutory construction and that this case does not warrant further review.

Statement of the Case.

Preliminary.

Drug abuse in the United States has reached alarming epidemic proportions (Legislative History, U.S.C.C. & A.N., April 20, 1972, p. 915).

Methadone maintenance is a proven, highly successful modality for the treatment of heroin addiction which has received the highest priority in the nationally coordinated effort to reach, treat and rehabilitate drug abusers.

The New York City Methadone Maintenance Treatment Program (NYCMMTP) is the largest and most rapidly expanding addiction treatment program in the nation. It has over 10,000 voluntarily enrolled patients in treatment at 43 clinics and is currently processing thousands of applications from street addicts seeking admission into the program. Other methadone programs in the City, public and private, treat approximately 22,000 additional patients.

Experts in the field of addiction treatment unanimously agree that confidentiality of information as to patients' identity and treatment is absolutely essential to the success of every drug abuse treatment program, and that it is important for the operators of programs such as the NYCMMTP to be able to give assurances of confidentiality to persons entering treatment. See 21 CFR 401, 37 Fed. Reg. 24636. Congress and the agencies charged with interpreting, administering and supervising the federal legislation have adopted this position as a uniform national policy.*

*Section 303 of the Public Health Service Act, as amended by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 42 U.S.C. §242a; Department of Health, Education and Welfare, FDA Regs., 21 CFR §130.44, 37 Fed. Reg. 26790-26807; FDA Regs., 21 CFR 130 published in 37 Fed. Reg. 6940, 6943 and declared effective July 24, 1972; Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. §1175 Special Action Office for Drug Abuse Prevention Regs., 21 CFR 401 published in 37 Fed. Reg. 24636-24639; 21 U.S.C. §872(c).

A forceful and explicit statement of the rationale underlying federal policy in this area is made by the Special Action Office for Drug Abuse Prevention in 21 CFR 401, 37 Fed. Reg. 24636:

> "If society is to make significant progress in the struggle against drug abuse, it is imperative that all unnecessary impediments to voluntary treatment be removed. *There is clear agreement among drug abuse treatment program operators that their ability to assure patients and prospective patients of anonymity is essential to the success of their programs.* The identification of a person as a patient of a general practitioner or hospital clinic is not ordinarily of great significance, but the identification of a person as an enrollee in a narcotic treatment program can, in and of itself, have profoundly adverse consequences.
>
> "It was in recognition of these considerations, among others, that Congress enacted section 408 of Public Law 92-255 (21 U.S.C. 1175). It must be emphasized that the operation of this section in no way creates a sanctuary for criminals. The enrollment of an addict in a treatment program takes away nothing, immunizes nothing, that would be available to law enforcement authorities if the program did not exist or the addict did not enroll in it. The only effect of his enrollment is to diminish the likelihood of his continued criminal conduct, and if the price of this is to isolate the records generated by the enrollment itself, this is a small price indeed in the light of the social benefits." (Italics added.)

The background of this litigation.

During the week of June 5, 1972, a New York City Police Department detective appeared at one of the NYC-MMTP clinics and requested the opportunity of viewing photographs of all male Negro patients which are main-

tained by the clinic as part of the patients' medical records. He stated that he was investigating a homicide and wished to show the photographs to an alleged witness who claimed to have seen the alleged perpetrator being treated at the clinic on a prior occasion. The detective's request was refused.

Thereafter, a subpoena was served on Dr. Robert G. Newman, as director of the NYCMMTP demanding production of "photographs of all Male Negro patients between the ages of 21-35 in the Methadone Maintenance Treatment Program."

A motion to quash the subpoena was made on the ground, *inter alia,* that controlling federal law prohibits disclosure of the photographs or any other information that would identify patients in a methadone maintenance treatment program.

The motion was denied, and Dr. Newman's continued refusal to comply with the court's direction that he produce confidential photographs of his patients, which were demanded by the grand jury subpoena was held to be contempt of court. He was sentenced to a term of imprisonment for 30 days. Although the District Attorney vigorously opposed the application, sentence was stayed pending appeal.

By its decision on May 31, 1973, the New York Court of Appeals vacated the adjudication of contempt and directed that the motion to quash the subpoena be granted.

The paramount public interest.

From the outset the prosecutor has approached this matter solely from the viewpoint of furthering a criminal investigation which has as its goal the apprehension of a

single individual suspected of having committed a crime against another individual.* That, however, is not the paramount public interest.

The breach of confidentiality that would follow if the prosecutor were upheld in his position would cause irreparable damage to the NYCMMTP and all similar

*The shrill tone of the petition seems more appropriate to the irresponsible tabloid press, attributing the blame for crime to the courts. If "a suspected murderer remains at large," it is not the fault of the New York Court of Appeals, as petitioner would so unfairly have one believe (Petition, pp. 3, 11). Such arguments have never been found persuasive by this Court (e. g., *Escobedo v. Illinois*, 378 U. S. 478, *Blackburn v. Alabama*, 361 U. S. 199; *Jackson v. Denno*, 378 U. S. 368).

During the hearing below, counsel for Dr. Newman made the following response to the argument that a murder investigation was in progress:

> "Dr. Newman has no reason to thwart the grand jury investigation in this matter. As a private citizen, he's all in favor of having the grand jury catch whatever criminal element there is.
>
> "On the other hand, this is no different than saying it would be easier for the district attorney and the grand jury to use unauthorized wiretap information or information obtained through an unauthorized search and seizure. It may be easier, but it is prohibited. * * *
>
> * * *
>
> "They can have any witness describe the suspect to a police artist, which is done often with great success. They can have a stakeout outside of the clinic with the witness, to see if the patient shows up. They can do anything that is lawfully within their realm to investigate * * *" (pp. 32, 38, Record on Appeal to New York Court of Appeals).

Moreover, respondent's counsel has never had the opportunity to examine the prosecutor and police to determine what, if any, investigation was made beyond the request to view the photographs in the NYCMMTP files.

programs throughout the nation which treat tens of thousands of former heroin addicts.

It is the opinion of experts in the field of addiction treatment that the sought disclosure would destroy the trust and confidence of patients in their physicians and counselors, so vital for this type of treatment to be effective, and would discourage a large number of prospective patients from seeking treatment. *This opinion was not contradicted during the proceedings below.*

Congress has recognized that "drug abuse, especially heroin addiction, substantially contributes to crime" (21 U.S.C. §1101). And in his State-of-the-State Message, Governor Rockefeller referred to the terrorization of the public "by the continued prevalence of narcotics addiction and the crime * * * it breeds" (N.Y.L.J., Jan. 4, 1973, p. 4, col 3).

At the same time, a study of criminal arrest rates based on a random sampling of patients in the NYC-MMTP, made in cooperation with the New York City Police Department, showed a dramatic decline in the arrest rate of patients; for those in treatment for thirteen months or more, there was a 96% decrease in arrests (see, Editorial "Cutting Addict Crime," N. Y. Times, Sept. 6, 1972).

We submit that the public interest will best be served by strengthening and expanding drug abuse treatment programs which are enrolling voluntarily, and successfully rehabilitating, tens of thousands of hard-core heroin addicts, each of whom while remaining on the street untreated poses as great a threat to society as the one man so assiduously sought by the prosecutor.

POINT I.

Since the term of the Third July 1972 Grand Jury which issued the subject subpoena has expired and that Grand Jury has been discharged, this proceeding to enforce compliance with the subpoena issued by that Grand Jury became moot upon the New York Court of Appeals' vacatur of the adjudication of contempt.

Petitioner writes as though the investigation by the Third July 1972 Grand Jury into the death of Talmadge Berry is still a viable proceeding. In fact, it is not.

We have been advised by counsel for petitioner that the term of the Third July 1972 Grand Jury has expired and it has been discharged. Accordingly, the proceedings below to enforce respondent's compliance with a subpoena issued by that particular grand jury became moot upon the vacatur of the adjudication of contempt.

Another grand jury may or may not decide to resume the investigation at this time.

Another grand jury may or may not believe that the police have exhausted all other means of identifying the suspect and that the circumstances warrant the issuance of a subpoena for the confidential photographs.

Another grand jury may or may not be persuaded by the appeal Dr. Newman made to the Third July 1972 Grand Jury to withdraw its subpoena because the overriding public interest requires absolute confidentiality of patient records and identifying information.*

*Dr. Newman's testimony before the Third July 1972 Grand Jury appears at pages 58-74 of the printed "record on appeal" in the New York Court of Appeals. Excerpts therefrom are reproduced as an Appendix hereto at pages 19-23, *infra*.

Another grand jury may or may not be persuaded by the unanimity of expert opinion, shared by federal law enforcement officials,* that the public interest is best served by measures calculated to strengthen and expand programs such as NYCMMTP, one of the foremost being the ability to assure street addicts of absolute confidentiality if they voluntarily enroll in the program.

The foregoing indicates that there is no longer the type of existing controversy necessary for this Court to retain jurisdiction to decide the merits. *SEC v. Medical Committee for Human Rights*, 404 U. S. 403, 406; *Golden v. Zwickler*, 394 U. S. 103, 108.

In *Roe v. Wade*, U. S. , 35 L. Ed. 2d 147, 161, this Court observed:

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*On November 8, 1972, the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, conferred upon Dr. Robert G. Newman a "Grant of Confidentiality" for all of the operating clinics of the New York City Methadone Maintenance Treatment Program covered under IND No. 7306 and BNDD Registration No. PN 0090201. The "Grant of Confidentiality" provides in pertinent part, as follows:

> "Under the authority vested in the Attorney General by Title 21, Section 872(e) of the United States Code, and delegated to the Director of the Bureau of Narcotics and Dangerous Drugs by Title 28, Section 0.100, of the Code of Federal Regulations, *I hereby authorize you to withhold the names and other identifying characteristics of persons who are the subjects of research conducted pursuant to and in conformity with this research project. You may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other proceeding to identify the subjects of such research.* This grant of confidentiality shall apply to all other persons engaged in carrying out the research program and shall cover all persons who are subjects of such research while the grant is in effect." (Italics added.)

All methadone maintenance programs are still investigational and all patients therein the "subjects of research" (21 C.F.R. §130.48(b), 37 Fed. Reg. 26806; 21 C.F.R. 130, 37 Fed. Reg. 6940).

> "The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated."

Such controversy no longer exists in this case and the petition should be denied.

The petitioner suggests (p. 11) that courts in other jurisdictions may arrive at an interpretation of the law inconsistent with that of the New York Court of Appeals. We doubt it, and we know of no pending appellate cases. If, however, that should occur, then will be time enough for this Court to review the matter and resolve any conflict. There is no need to do so at this time since not only does no conflict exist, but none threatens.

POINT II.

The court below correctly held that the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255) effected no repeal or modification of the authority conferred by the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513) upon the Attorney General and the Secretary of Health, Education and Welfare to provide for absolute confidentiality in the case of patients in methadone maintenance programs.

The need for absolute confidentiality in the case of methadone programs.

Methadone is an addictive narcotic which must be continuously taken by the patient; its abrupt discontinuance produces severe withdrawal symptoms.*

*The medical guidelines of the NYCMMTP provide for detoxification of patients maintained on the usual dosage of 80-120 mg. per day to take place over a period of at least three weeks.

For this reason, the methadone maintenance patient is in a completely different position than his counterpart in a drug-free modality. Unlike the patient in a drug-free program, the methadone maintenance patient does *not* retain the option of simply discontinuing treatment whenever he feels threatened by the likelihood of impending or actual breach of confidentiality. He must return to the clinic for his daily medication.

An addict admitted to a methadone maintenance treatment program is in fact entering, knowingly, a situation from which there is no immediate escape, and in which the clinical staff controls the medication upon which he is pharmacologically dependent from one day to the next.*

*The dangers posed by the potential for abuse in this type of situation were discussed by Dr. Newman in 1970, two years prior to the onset of this litigation, and are treated in Brecher, Licit and Illict Drugs (Little, Brown & Co. 1972), in Chapter 19, "The Future of Methadone Maintenance," where the following appears (p. 178):

> "The heroin addict today is a serf of the heroin black market. When he goes on methadone maintenance, he becomes a potential serf of whoever controls the methadone program. This is not the fault of methadone, of course; it is the result of his becoming addicted to heroin in the first place. Whether on heroin or methadone, the addict must dance to whatever tune the piper plays.
>
> "Most existing methadone maintenance programs play a sensible tune.
>
> * * *
>
> "Let us suppose, however, that methadone maintenance programs drift into the hands of agencies with other goals. One example is a police department, which might use a methadone maintenance program as a recruiting center for stool pigeons, or witnesses. Leaders of the black community are particularly concerned that the power of those who control methadone maintenance may be misused to repress black organizations and aspirations. These are not idle imaginings. In at least one city, patients on methadone maintenance have already been organized to vote for a political candidate who promised to support a

Understandably, therefore, such addicts must be assured of absolute confidentiality to enlist them voluntarily in programs such as NYCMMTP.

Congress has recognized the distinction which grows out of the unique, still experimental, treatment involved in methadone maintenance. For that reason the absolute confidentiality provisions of Public Law 91-513 are limited to drug research programs, such as NYCMMTP. On the other hand, the confidentiality provision in Public Law 92-255 (21 U.S.C. §1175) applies to *all* "drug abuse prevention functions" including drug-free treatment programs, drug abuse education programs, etc., whether or not related to research into the long-term effects of addictive drugs such as methadone.

Read in this light, it is immediately evident that there is no conflict among the various statutes and regulations. Certainly, there is no basis for finding that the 1972 Act

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(footnote continued):

> continuation of their supply. In a number of other cities, methadone programs are deeply enmeshed in local policies.
>
> "Probation and parole departments have been establishing or planning to establish methadone maintenance programs in several states and cities—and police departments may be next. The patient on methadone maintenance who must placate a police officer, or a probation or parole officer empowered both to return him to prison and to cut off his methadone, is in a vise with two turnscrews.
>
> "A thoughtful review of this problem was presented at the Third National Conference on Methadone Treatment (1970) by Dr. Robert G. Newman, director of the New York City Health Department's Methadone Maintenance Treatment Program. 'It is my conviction,' Dr. Newman stated, 'that the abuse and misuse of addiction treatment programs poses at least as great a threat to our patients as does the abuse of illicit drugs.' "

impliedly repealed the 1970 Act. In *United States v. 24 Cans Containing Butter,* 148 F. 2d 365, 367, the Court stated:

> "Implied repeal or limitation of one act by another is never favored. It is not for the courts, unless the conflict between two acts is inescapable and compelling, to exclude from the coverage of an act matters which its terms expressly include, on the theory that another act, whose general purpose seems inconsistent has impliedly repealed or limited the act under review. Only where it is found that it is not possible for both acts to coexist can an act be held to repeal or limit another, and then only in respect to the precise point of conflict. It certainly cannot be said that there is any fatal inconsistency between the two acts here."

The proper approach to the questions of statutory construction presented by this case—and the one employed by the court below—was stated by Chief Justice Marshall in *Pennington v. Coxe,* 6 U. S. (2 Cranch) 33, 59:

> "Where the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded. It is the duty of the court to discover the intention of the legislature, and to respect that intention. Where the provisions of two acts are so alike each other, that the comparison exhibits only a contrast, instead of saying that their opposing regulations were designed to be similar, it would seem much more reasonable to say that the one act exhibits a legislative mind materially variant in the particulars where the difference exists from what is exhibited by the other."

The quaintness of the Court's language should not obscure its relevance to the case at bar. Absolute confidentiality expressly provided for by the Congress in P.L. 91-513 is "so unlike" the balancing test provided in P.L. 92-255 that it "seems much more reasonable to say" that one was intended to deal with methadone and other research programs, while the other applies to a broader class of "drug abuse prevention functions" and programs in which absolute confidentiality, while desired, is not as essential.

The Legislative History of P.L. 92-255 referred to by petitioner (pp. 9-10) is misleading and based on isolated comments taken out of context.

Petitioner refers to the floor discussion of the bills that eventually became the Drug Abuse Office and Treatment Act of 1972. The discussion in the Senate on December 2, 1971, participated in by many members, fills 62 pages of the Congressional Record (117 Cong. Rec. S20189-S20251). The discussion in the House on February 3, 1972, also participated in by numerous members, appears at pages H676-H715 of the Congressional Record for that day.

Obviously, isolated fragments of the remarks of individual members are not evidence of an Congressional alleged intent impliedly to repeal a major piece of legislation (91-513)* enacted only two years earlier. In *Zuber v. Allen*, 396 U. S. 168, 186, this Court wrote:

*During the floor discussion, the 1970 Act was referred to several times. Senator Scott, "one of the original cosponsors" of the 1972 Act, stated (117 Cong. Rec. S20239):

> "One of the major efforts of this administration has been directed toward stamping out the disastrous scourge

> "We consider our conclusions in no way undermined by the colloquy on the floor between Senator Copeland and Senator Murphy upon which the dissent places such emphasis. A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance. There is no indication, however, that the question of nearby differentials and the meaning of 'market * * * differentials customarily applied' were precisely considered in the floor dialogue. The exchange is not only brief but also inconclusive as to meaning."

The Conference Report.

The Joint Explanatory Statement of the Committee of Conference (House Report No. 92-920, 92d Cong., 2d Sess.; 1972 U.S.C.C. & A.N. pp. 930-940) states with respect to "confidentiality of patient records" (p. 940):

(footnote continued):

> of drug abuse. Both within the United States and abroad, the President has taken a personal hand in initiating and guiding Federal action.
>
> "In the legislative area, these actions include his proposal of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which the President signed into law in October of that year. I was gratified to take an active part in the passage of this vital consolidation and revision of our dangerous-drug laws."

This is hardly indicative of Congress' alleged intent to effectuate an implied repeal of the "vital" 1970 Act.

> "The conferees wish to stress their conviction that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assumed that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.
>
> "Every person having control over or access to patients' records must understand that disclosure is permitted only under the circumstances and conditions set forth in this section. Records are not to be made available to investigators for the purpose of law enforcement or for any other private or public purpose or in any manner not specified in this section."

There is no indication in this statement by the Committee of Conference, or anywhere else during the floor discussion of the bills, that Congress intended to alter in the slightest the power it had conferred by P.L. 91-513 upon the Attorney General and the Secretary of Health, Education and Welfare to provide for absolute confidentiality of information that would identify patients in a drug research program.

The "coordinated long-term Federal strategy to combat drug abuse."

The 1972 Act (21 U.S.C. §§1101-02) declares it to be the national policy to "develop a comprehensive, coordinated long-term Federal strategy to combat drug abuse," and charges the Director of the Special Action Office with the duty of coordinating the drug abuse prevention functions of the various federal agencies and those of state and local governments (21 U.S.C. §§221,

229). Nowhere, however, is it suggested that there should be a "single uniform approach to be followed by all drug research and treatment programs" (Petition, p. 9).

In the fight against drug addiction, there is room for a variety of approaches, methadone maintenance is only one, drug-free programs another. Obviously such dissimilar treatment programs cannot be forced into one uniform mold. It was never the intent of Congress that they should be.*

*Since petitioner has referred to the floor discussion in the Senate on December 2, 1971, we note the following statement by Senator Brock which illustrates our point (117 Cong. Rec. S20250):

> "At the present time the Federal Government is involved in a great many efforts designed to approach the drug abuse problem on a number of different fronts. Work is being done on the methodology of rehabilitating addicts, on the development of a workable detoxification agent which can ease the physical pain of withdrawal, on the development of a long-lasting antagonist drug to be used in the treatment of heroin addicts, and in a great many more areas vital to a comprehensive approach to this Nation's drug abuse problems.
>
> "All of these efforts are highly experimental in nature, and this is as it must be. We have no answers in the field of drug abuse. Few, if any, treatment programs have been able to claim any real success in the rehabilitation of drug addicts. We know that our education and prevention programs leave a good deal to be desired. In short, a great deal of work is yet to be done.
>
> "The Special Action Office for Drug Abuse Prevention, proposed in the President's message and in the legislation now before us, will perform a critical role in our efforts to provide solutions to the problems of drug abuse. It will coordinate and direct the entire Federal effort in this area. It will make certain that each component performs its assigned tasks, and that each serves to complement the functions and achievements of the other coordinates."

CONCLUSION.

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
June 26, 1973.

Respectfully submitted,

THOMAS R. NEWMAN,
Counsel for Respondent.

BENJAMIN H. SIFF,
Of Counsel.

APPENDIX.

Excerpt From the Transcript of Dr. Newman's Appearance Before 3rd Grand Jury for New York County on July 25, 1972.

"A. Obviously you're involved in a particular investigation which again I admit is extremely serious. I just want to emphasize to the grand jury that what I'm involved in is professionally is treatment and to treat successfully thousands and thousands of patients in the Methadone Maintenance Treatment Program. That my position in this matter of confidentiality, that my position respectfully not to comply with the request for the photographs is not just my own individual sentiments. This isn't a decision that I alone reached. I'm basing my own decision on what I have seen in the Congressional records, the statements, the intent that I have seen expressed in writing in the Federal Registry of the Food and Drug Administration, which unequivocally states their intent that there must be confidentiality and total confidentiality of the records of patients in drug abuse programs. I refer to the unequivocal intent expressed in the Congressional Record by the Congress of the United States, which again states without question that total confidentiality is an absolute must if drug abuse programs are going to be able to succeed. As a resident also of the County of New York City, I share with you the desire to apprehend criminals, to apprehend murderers. I just urge you to consider that for our interest, for the interest of the City of New York, as well as for our patients, as well as for potential patients that the confidentiality of the patient's records be kept absolutely uncompromised, and that is the plea that I would like to make to you.

Mr. Dudley: Any questions of Doctor Newman?

Q. Here's a question by one of the Jurors. When a patient enters the program, do you promise secrecy to the patient? A. Yes, sir, we do. It is explicitly emphasized in our procedure manual which governs the operation of every single clinic in which we have currently, the population is 6,400 patients are enrolled. We have a statement that the photographs, number 1, are required. We have a statement that the photographs are required, we also have a statement that concerns the patient's regarding the use of these photographs which is explained by law concerned in that regard. Let me say that before that manual was written we had the experience, it happened to be in the same clinic, where people would come in, and enter the program on one day, and then fail to show up again. And we were advised in this, and a year and a half ago by the clinic staff that's when patients were told they'd have to produce 2 photographs. One for an identification card, and one for the maintenance in the nursing stage of the clinic. That several patients refused to come back because they were certain of the possible disclosure of these photographs or other use of these photographs in criminal actions. And with that experience, again this is not a hypothesis on our part. This was the experience that we had, and this lead us to include in the procedure manual specific reference to assure patients that these photographs are kept confidential.

Q. The people that have left, if we were only to ask for people that have left the Methadone Program, would you still consider these persons patients, and refuse to comply? A. I would consider that divulging information from the records of former patients, it would have exactly the same impact on the relationship between patient and staff.

Q. Doctor Newman, why do you feel that the whole Methadone Program would be jeopardized by producing the photographs to the grand jury? A. Our program emphasizes the critical nature of safeguarding the confidentiality of the patient's records. We have very frequently met with all different types of members of all of our clinics, which numbers 37 of them in the City. Word of the particulars subpoena which as Mr. Dudley said was issued to a unit supervisor at one of the clinics. Word of that subpoena has now gotten around to every single one of our clinics. Now they will know about it in the Central Office, by word of mouth among the staff in the various clinics. Everybody knows about this procedure. The staffs of all the clinics will know what the outcome of the procedure are, certainly the patients in that particular clinic now and I can just tell you how rapidly this sort of a result is spread from clinic to clinic.

Q. In other words, they will know, because you will tell them, is that what you're saying? A. No, sir, I emphasize that I did not let it known in the clinic that this is the particular procedure that is going on. It's now common knowledge, just common knowledge, and everybody in the clinic will want to know what the outcome is of this particular case.

Q. Doctor Newman, another juror wants to know you mentioned that there are other legal avenues or other recourses that your office will have to get the information that we need in this case, did you mention that in your— A. Just now.

Q. In your testimony today? A. I don't believe I did.

Q. Another juror would like to know, shouldn't the safety of the public be considered with a possible methadone killer on the loose? A. Obviously it has to be considered. Again the safety of the public, the safety of the people of New York City, in the case of one possi-

ble murderer, that is one thing that has to be considered. On the other hand, we're talking about the danger that everyone, you know faces living in Manhattan. Addiction and the addict is the number one domestic problem. Methadone programs is one of the higher, I would say the highest priority response to this overwhelming program. And I am concerned, and I am convinced that this, the disclosure of patient's records will threaten this very effective treatment program, with the result that tens of thousands of addicts will continue to do and return to do, and that is terrorize, to rob, to steal to do everything that it takes to support a habit. It's that danger that I'm addressing myself to.

Mr. Dudley: Thank you. We're going to conclude this ladies and gentlemen.

Q. Could you briefly tell us how, effective your methadone program has been? Do you have any statistics on that? A. Yes, briefly I would say it is uniquely effective in the treatment of heroin addicts. More effective than other program that I know of. Very briefly our retention of people that have entered the program and remain in treatment, we have admitted roughly 7,500 patients, since the program began a year ago, and have increased the rate of growth. We have retained in treatment, approximately 85 percent of that number. This type of retention is unmatched by any other program that I know of. We are also successful in terms of employment, and the rate of employment among our patients climbs drastically, the arrest rate which is obviously a very critical measure. The arrest rate decreases drastically when patients are admitted to the program, depending if public assistance decreases. So that I would say that this a very extremely effective program. And that this is the case is really apparent in

the fact that every level of Government, the City of New York, The State of New York, the Federal Government have given this particular type of program the very highest priority in dealing with the number one program."

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1694

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

v.

ROBERT NEWMAN, M. D.,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

PETITIONER'S REPLY MEMORANDUM

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JONATHAN LOVETT
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PETITIONER'S REPLY MEMORANDUM

Respondent's contention that certiorari should be denied simply because the proceedings to enforce the subpoena *duces tecum* are moot is unpersuasive. A viable controversy exists between the parties regarding the validity of respondent's conviction for contempt of court. And since any future execution of respondent's sentence would not be affected by the prior expiration of the Third July 1972 Grand Jury, this case is neither moot nor does it involve any complex jurisdictional issue.

Moreover, respondent's argument regarding the enforceability of the subpoena, which is purely an issue of New York State law, is factually erroneous and legally without support. Contrary to respondent's statement that the investigation into the death of Talmadge Berry is no longer "viable" (Respondent's brief, p. 8), a new investigation was commenced after the expiration of the Third July 1972 Grand Jury and is currently pending before another New York County grand jury. Contrary to respondent's assertion that the challenged subpoena was "issued by that particular [Third July 1972] grand jury" (*id.*), the subpoena was issued, as is clear from its face, by the District Attorney, counsel for petitioner. *See* Appendix. Contrary to respondent's suggestion that the subpoena was returnable only before the Third July 1972 Grand Jury, the express language of the subpoena imposed no such limitation. *Ibid.* And despite respondent's unsupported conclusion that the proceedings below to compel compliance with subpoena are moot (Respondent's brief, p. 8), it is clear that the New York State courts would require respondent's compliance with the subpoena should this Court reverse the judgment of the Court of Appeals.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MICHAEL R. JUVILER
JONATHAN LOVETT
Assistant District Attorneys
Of Counsel

July, 1973

Subpoena Duces Tecum

SUBPOENA (Duces Tecum) FOR A WITNESS
TO ATTEND THE GRAND JURY

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To Robert Newman, Director, New York City
Methadone Maintenance Treatment Program.

YOU ARE COMMANDED to appear before the Grand Jury of the County of New York, at the Grand Jury Room, in the ninth story of the Criminal Courts Building, at 155 Leonard Street, between Centre and Baxter Streets, in the Borough of Manhattan of The City of New York, on the 11 day of July, 1972, at the hour of 1:30 in the afternoon of the same day, as a witness in a criminal Investigation into the Death of Talmadge Berry and that you bring with you and produce, at the time and place aforesaid, a certain photographs of Negro males between the ages of 21-35, who were patients at the Methadone Maintenance Program at Francis Delafield Hospital in unit number two during the calendar year 1972 prior to June 7, 1972, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises, and for a Failure to Attend you will be deemed guilty of a Criminal Contempt of Court, and liable to a Fine of Two Hundred and Fifty Dollars and Imprisonment for thirty days and to be prosecuted and punished for a misdemeanor.

Dated at the Borough aforesaid, in the County of New York, the 30 day of June, 1972.

FRANK S. HOGAN, District Attorney.

SO ORDERED:

_____

Justice of the Supreme Court

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No. 72-1694

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE STATE OF NEW YORK, PETITIONER

v.

ROBERT NEWMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

KEITH A. JONES
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1694

THE STATE OF NEW YORK, PETITIONER

v.

ROBERT NEWMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States.

QUESTION PRESENTED

Whether the Drug Abuse Office and Treatment Act of 1972 revoked the authority granted to the Attorney General and the Secretary of Health, Education, and Welfare by the Comprehensive Drug Abuse Prevention and Control Act of 1970 to authorize the directors of drug research programs to withhold the names or other identifying characteristics of individuals participating in such programs.

STATEMENT

1. This case involves the interrelationship of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, and the Drug Abuse Office and Treatment Act of 1972, Pub. L. 92-255, 86

Stat. 65, as they apply to the confidentiality of the names and identifying characteristics of individuals participating as patients in methadone maintenance treatment programs. Such programs involve research into the safety and effectiveness of methadone and may only be conducted with the approval of the Attorney General or the Secretary of Health, Education, and Welfare. See 21 U.S.C. 355(i) and 872; 21 C.F.R. 130.44.

Prior to 1970, there were no federal restrictions on the release of patient records by persons conducting research into the safety and effectiveness of methadone. Under federal law, a program director could voluntarily release patient records for use in criminal investigations or other purposes. Moreover, such records were subject to legal process.

The susceptibility of patient records to legal process hampered the conduct of methadone maintenance treatment programs; individuals were deterred from participating as patients by the knowledge that program records might be used in a criminal investigation into illicit drug-related activities. See H. Rep. No. 91-1444, 91st Cong., 2d Sess., Part 1, p. 28. To remedy this problem, Congress, in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, granted both the Attorney General and the Secretary authority to authorize methadone maintenance treatment program directors, and other persons engaged in research on the use and effect of drugs, to withhold the names and other identifying characteristics of the individuals participating as patients in their programs. See 21 U.S.C. 872(c) and 42 U.S.C. 242a(a). Persons so authorized by the Attorney General or the Secretary "may not be compelled in any Federal, State, or local civil, criminal, administrative, legislative, or other

proceeding to identify the subjects of research for which such authorization was obtained." *Ibid.* Thus under the 1970 Act, a methadone maintenance treatment program director retained discretion voluntarily to release patient records, but, upon authorization by the Attorney General or the Secretary, he may refuse disclosure if he chooses to do so.

In 1972, the Secretary, acting through the Commissioner of Food and Drugs, adopted regulations implementing his authority to authorize nondisclosure under the 1970 Act:

> * * * in accordance with the authority conferred by [42 U.S.C. 242a(a)], every program is hereby further authorized to protect the privacy of patients therein by withholding from all persons not employed by such program or otherwise connected with the conduct of its operations the names or other identifying characteristics of such patients under any circumstances under which such program has reasonable grounds to believe that such information may be used to conduct any criminal investigation or prosecution of a patient. Programs may not be compelled in any Federal, State, or local civil, criminal, administrative, or other proceedings to furnish such information * * *. [21 C.F.R. 130.44(g).]

Also in 1972, Congress further acted to ensure the confidentiality of patient records by significantly restricting the circumstances under which program directors could voluntarily release such records. Section 408 of the Drug Abuse Office and Treatment Act of 1972, 86 Stat. 79, 21 U.S.C. (1970 ed., Supp. II) 1175, provides that patient records "shall be confidential and may be disclosed [to persons other than physicians or other persons connected with the program] only * * * [i]f [disclosure is] authorized by an appropriate order of a

court of competent jurisdiction granted after application showing good cause therefor." Thus under the 1972 Act, a program director may not release patient records for use in a criminal investigation unless he is specifically authorized to do so by a court.

2. Respondent is the Director of the New York City Methadone Maintenance Treatment Program. On June 30, 1972, respondent was served with a state grand jury subpoena to produce photographs of patients in his program. The subpoena was issued in connection with a criminal investigation into a murder committed in New York City; the photographs were sought because a witness to the crime believed that she had previously seen the killer being treated as a patient in respondent's program. Respondent moved to quash the subpoena in the state trial court, and that motion was denied (Pet. App. C). Respondent subsequently refused to obey the trial court's order to comply with the subpoena, and he was adjudged in contempt and sentenced to 30 days in jail.[1] Respondent's conviction was affirmed by the state intermediate appellate court (Pet. App. B).[2]

Shortly after the decision of the intermediate appellate court the Attorney General, pursuant to his authority

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[1]The trial court's order was stayed pending appeal, and respondent was never required to serve any part of his sentence.

[2]The intermediate appellate court modified the subpoena in order to restrict the extent of the ordered disclosure and granted respondent 30 days in which to comply with the subpoena as modifed and thereby purge himself of the contempt (Pet. App. B, p. 18a). Respondent, however, chose to appeal and did not comply with the subpoena as modified.

under 21 U.S.C. 872(c), authorized respondent "to withhold the names and other identifying characteristics of persons who are the subjects of research conducted pursuant to and in conformity with [his] research project" (Pet. App. A, p. 6a, n. 5). The Secretary's regulations authorizing nondisclosure were adopted the following month. 37 Fed. Reg. 26800; 21 C.F.R. 130.44(g). The New York Court of Appeals subsequently reversed the order of the intermediate appellate court, vacated respondent's adjudication of contempt, and granted respondent's motion to quash the subpoena (Pet. App. A).[3]

DISCUSSION

Petitioner contends that Section 408 of the 1972 Act, 21 U.S.C. (1970 ed., Supp. II) 1175, impliedly revoked the authority of the Attorney General and the Secretary of Health, Education, and Welfare under 21 U.S.C. 872(c) and 42 U.S.C. 242a(a), respectively, to authorize nondisclosure of methadone maintenance treatment program records. In our view, the New York Court of Appeals

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[3]In the Court of Appeals, respondent asserted the separate authorizations of the Attorney General and the Secretary as grounds for quashing the subpoena and vacating the contempt judgment. Petitioner argued in response only that the 1972 Act had revoked the authority of the Attorney General and the Secretary to authorize nondisclosure, an argument the court rejected. Petitioner did not contend that those authorizations, even if valid, would not be grounds for vacating the prior contempt judgment; the court of appeals therefore had no occasion to consider that question. In any event, we believe those authorizations did bar execution of respondent's sentence; that sentence was apparently intended to be coercive (see note 2, *supra*) and therefore part of a proceeding to compel respondent to identify his patients; any such proceeding was barred by 21 U.S.C. 872(c) and 42 U.S.C. 242a(a) once the Attorney General and the Secretary had acted.

correctly rejected this argument and there is no cause for further review of this issue.

Petitioner's contention is based upon a fundamental misunderstanding of the purpose of the 1972 Act's non-disclosure provisions. As we have explained above (pp. 3-4, *supra*), Section 408 of that Act was intended to enhance—not diminish—the confidentiality of patient records . The central purpose of that provision was to remove from the directors of drug abuse prevention programs their previous authority to release patient records at will. That purpose, and the language used by Congress to effect it, are entirely harmonious with the authority earlier granted to the Attorney General and the Secretary to authorize program directors to refuse production of patient records sought by subpoena or other legal process.

Thus, reading the 1970 and 1972 Acts together, a methadone maintenance treatment program director is not empowered even to comply with a subpoena for production of patient records until a court has authorized him to do so, and, under the Secretary's regulations, the most a court can do under such circumstances is to *authorize* voluntary compliance, for 42 U.S.C. 242a(a) bars the courts from *ordering* involuntary compliance. The plain language of these statutes does not seem reasonably subject to any other construction.

Moreover, this reading of the 1970 and 1972 Acts has been the consistent interpretation of those provisions by the Special Action Office for Drug Abuse Prevention, which was established by the 1972 Act to "provide overall planning and policy and establish objectives and priorities for all Federal drug abuse prevention functions" (21 U.S.C. (1970 ed., Supp. II) 1131(a)). See 21 C.F.R.

401.61 and 401.62.[4] It has also been the understanding of the Secretary, whose regulations authorizing nondisclosure under the 1970 Act were proposed and adopted after passage of the 1972 Act, and of the Attorney General, whose nondisclosure authorization to respondent also was issued after the 1972 Act became effective. This Court has often noted that "[w]hen faced with a problem of statutory construction, * * * great deference [is owed] to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman,* 380 U.S. 1, 16. Thus even if the pertinent statutory language was less clear than it in fact is, the position taken jointly by the Special Action Office, the Secretary, and the Attorney General should be sustained.

Furthermore, petitioner's argument that the 1972 Act effected a repeal by implication—an argument traditionally disfavored by the courts (see, *e.g., United States* v. *Borden Co.,* 308 U.S. 188, 198-199)—has no basis in the legislative history. Congress at no point intimated an intention of revoking the authority it had granted to the Attorney General and the Secretary only two years earlier. See 21 C.F.R. 401.62. To the contrary, in discussing Section 408 of the 1972 Act, the provision relied upon by petitioner, the Conference Committee emphasized that the purpose of that provision was to assure "[e]very patient and former patient * * * that his right to privacy will be protected." H. Rep. No. 92-920, 92d Cong., 2d Sess., p. 33. A repeal of the Attorney General's and the Secretary's powers to authorize nondisclosure would of course have been incompatible with that purpose and was not intended by Congress.

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[4]On September 24, 1973, those provisions were redesignated 21 C.F.R. 1401.61 and 1401.62 (38 Fed. Reg. 26611); they were subsequently republished on December 6, 1973 (38 Fed. Reg. 33744).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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